

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 759 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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MOHMAD ISMAIL ABDUL MAHID SHEKH

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA, L.A. for the appellants
Y.F.Mehta LAPPfor Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 04/02/97

ORAL JUDGEMENT (N.J.Pandya,J.)

The appeal is filed by both the accused of Sessions Case No.228 of 1987 of the City Sessions Court, Ahmedabad. The incident is said to have happened on 6-10-1987 at about 2.30 p.m. near Jamalpur Munda Darwaja situated by the side of Siddi Saiyad Baba-ni-Darga. Accused no.1 and the deceased Jamila were married. Twins were born out of that marriage; but gradually, accused no.1 and Jamila started quarelling and it finally, resulted into her divorce. She was, therefore, staying with her two children-one is Son, Abdul Karim and another is a daughter. By the time the incident happened, the boy grew to 12 years and was working at a tea stall situated at aforesaid place. The deceased used to bring noon meal to her Son at the said tea stall every day. On the day of the incident, she came with noon meal and the boy after taking the meal had gone for delivering tea at a nearby telephone exchange. At that time, accused no.1 is said to have come in a rickshaw, pulled her away from the tea stall and had quarelled with her. Accused no.1 immediately took out a knife from his pant's pocket and

inflicted several injuries on her with fatal consequences.

2. She was taken to V.S.Hospital by 3.00 p.m. where in the emergency ward, Doctor on duty, Dr.S.C.Shah, had taken case history, which indicated involvement of accused no.1. Later on, things developed implicating accused no.2. So far as the fatal injury that could have been caused by knife is concerned, there is no dispute at all. The prosecution has successfully proved the same and before us, no submissions are made in this regard.

3. Initially, L.A. Mr.Anandjiwala had tried to bring about discrepancy in the prosecution case with a view to see that both the accused may be acquitted, and if not, atleast benefit of doubt be given. For this purpose, he had submitted that both the eye witnesses i.e. son of the deceased, Abdul Karim, p.w.2 and said tea stall owner Hadisara Rehman alia Bababhai, p.w.3, have not supported the prosecution and this would leave the prosecution with only the dying declaration. This dying declaration could be oral and written as well. However, in fact, they all turned out to be written, in the sense, that whatever that the illiterate lady had said to the witnesses i.e. the Doctor, Executive Magistrate and the Police Officers, has been reduced to writing in one form or the other. That is why, the dying declaration is in writing. However, the statements given by those 2 eye witnesses, who have been cross examined by the prosecution, as they turned hostile, clearly reveal that, according to these witnesses, the prosecution case against the accused could have been that only accusedno.1 had inflicted the injuries and he was the only person present at the time of the incident. If they had supported the case of the prosecution, that is the version that they could have come with and would have given. In other words, so far as these witnesses are concerned, it was accused no.1 who had come and had given blows with knife to the deceased. Later on, accused no.2 came to be involved in the dying declaration and in the FIR, but about its credibility, definite doubt is created, because before any treatment was started by the Doctors when the Doctor who admitted the patient in the hospital received information from the son of the deceased namely Abdul Karim about involvement of accused no.1 alone. In our opinion, there is sufficient material for holding accused no.1 responsible for the incident and therefore, the appeal filed by accused no.1 fails.

4. With regard to involvement of accused no.2, except for said involvement in her dying declaration

without specifying any definite role and generally referring to accusedno.2, as a person also giving blows, she has not given any details in either the dying declaration or in the FIR.

5. The prosecution having come, so far as those 2 eye witnesses are concerned, with the aforesaid case, this new development in form of dying declaration and FIR, in our opinion, should be carefully and cautiously evaluated so far as accused no.2 is concerned. If at all anybody had reason for causing death of deceased, it was only accused no.1 who had reason because he and the deceased were not on good terms and their relations were strained to such an extent that he had divorced her by uttering the word "Talak" thrice. In this background, sudden involvement of accused no.2 in the aforesaid manner in the dying declaration recorded by the Executive Magistrate and in the FIR, in our opinion, cannot be given undue importance and instead, doubt is created by the version of the prosecution itself through the evidence of the aforesaid two eye witnesses and the benefit of the same should go to accused no.2.

6. In the result, so far as accused no.1-appellant is concerned, his appeal is dismissed, and order of conviction and sentence passed against him by the trial Court is confirmed. So far as accused no.2-appellant is concerned, he is given benefit of doubt and is ordered to be set at liberty forthwith, if not required for any other purpose. The order of conviction and sentence passed against him by the trial Court is set aside.
